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(SPACE BELOW FOR FILING STAMP ONLY)

F. Robert D. Sumwalt, Clerk D

AUG 22 1978

By JDM, Deputy

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO

GREMLIN INDUSTRIES,  
a Delaware Corporation,

Plaintiff

vs.

CIRCLE INTERNATIONAL CO.,  
INC., etc. et al.,

Defendants.

CASE NO. 416704

DECLARATION OF  
H. FRANK FOGLEMAN

Date: August 24, 1978  
Time: 1:30 p.m.  
Place: Department 4

I, H. FRANK FOGLEMAN, declare as follows:

1. I am, and at all times material herein was, the President of GREMLIN INDUSTRIES, a Delaware Corporation and Plaintiff herein. That the following facts, I know them to be true of my own personal knowledge and if called and sworn as a witness in this matter, I could and would competently testify thereto.

2. That as President of GREMLIN INDUSTRIES (hereinafter referred to as Plaintiff) I am the person primarily in charge of all transactions with CIRCLE INTERNATIONAL CO., (hereinafter referred to as Defendant corporation) and have been for in excess of five years.

1           3. At the time Plaintiff entered into its oral agreement  
2 with the Defendant corporation in April of 1973, and without  
3 interruption, to this day, Plaintiff corporation has had as  
4 its principle place of business, located in San Diego County.  
5 During the three years subsequent to April, 1973, Plaintiff's  
6 place of business was located at 7030 Convoy Court, San Diego,  
7 California, 92117. Thereafter, Plaintiff's place of business  
8 is located at 8401 Aero Drive, San Diego, California, 92123.  
9 That during the respective time periods, these are the addresses  
10 of the place of manufacture and delivery of all goods sold to  
11 Defendant corporation and the addresses at which payment was  
12 to be received for those goods sold to Defendant corporation.

13           4. That on or about April, 1973, Plaintiff entered into  
14 an oral agreement with a representative of the Defendant  
15 corporation whereby Defendant agreed to purchase and to  
16 distribute the products manufactured by the Plaintiff.  
17 Under the terms of said agreement, Defendant would purchase  
18 goods manufactured by the Plaintiff and would thereafter  
19 resell said goods to various third parties. Said oral  
20 agreement of distributorship above-referred to, was entered  
21 into in San Diego, California by and between the President  
22 of Defendant corporation, DEAN MCMURDIE and myself as President  
23 of Plaintiff at Plaintiff's place of business on 7030 Convoy  
24 Court, San Diego, California.

25           5. From the inception of the above-referred to agreement  
26 of distributorship, the goods manufactured for the Defendant  
27 corporation were shipped to the Defendant corporation f.o.b.  
28 Plaintiff's place of business in San Diego, California. Attached

1 hereto, collectively marked Exhibit "A", and incorporated herein  
2 by this reference as though set forth in full, are true and  
3 correct copies of Plaintiff's invoices to Defendant corpor-  
4 ation, all of which show on their face that the shipments  
5 were f.o.b. Plaintiff's factory in San Diego County. These

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1 invoices are furnished as illustration only and do not  
2 reflect each and every transaction where Plaintiff sent  
3 goods to Defendant corporation. However, these invoices  
4 illustrate that delivery of the goods sold to Defendant  
5 corporation was to be accomplished in San Diego County and  
6 that Plaintiff's obligations under the above-referred to  
7 agreement were to be performed in San Diego County.

8 6. In addition, from the inception of the above-referred  
9 to agreement of distributorship, Defendant corporation was  
10 required to make payment to Plaintiff for the goods shipped  
11 to Defendant at Plaintiff's place of business, San Diego  
12 County. Specifically, Defendant corporation was obligated  
13 to pay Plaintiff on a thirty-day account whereby Defendant  
14 corporation was obligated to send to the Plaintiff at Plaintiff's  
15 place of business in San Diego, California, payment for each  
16 shipment of goods within thirty days after delivery of said  
17 goods to Defendant corporation f.o.b. Plaintiff's factory  
18 in San Diego, California. Plaintiff's invoices to Defendant  
19 corporation, attached hereto as Exhibit "A", show that the  
20 terms of payment was "NET 30" which in the industry means  
21 payment for the goods shipped pursuant to said invoices to  
22 be delivered to Plaintiff at Plaintiff's place of business  
23 within thirty days from delivery. These transactions further  
24 illustrate the fact that performance of Defendant's obligations  
25 under the above-referred to agreement, namely the payment of  
26 money, was to be made in San Diego County.

27 7. In addition, attached hereto, marked collectively  
28 as Exhibit "B" incorporated herein by this reference as

though set forth in full are true and correct copies of numerous invoices from the Plaintiff to Defendant corporation. The terms of said invoices were c.o.d. (cash on delivery) and invoices so marked were utilized by Plaintiff in its transactions with the Defendant corporation on and after December of 1977. By the terms of said invoices, the Defendant corporation was required to submit to the carrier its payment for the goods shipped immediately upon delivery of the merchandise to Defendant corporation and the carrier would transmit said payment to Plaintiff's place of business in San Diego, California. Said arrangement for the payment of the goods shipped by Plaintiff to Defendant corporation was made necessary because of Defendant corporation's repeated failure to submit payment to Plaintiff at Plaintiff's place of business within thirty days after shipment in accordance with the "NET 30" provisions in the subject invoices.

8. At no time whatsoever, did Defendant corporation object with respect to the manner of delivery of the goods, by Plaintiff, i.e. f.o.b. Plaintiff's factory, or with respect to the place at which Defendant corporation was to make payment to the Plaintiff for the goods delivered, i.e. at Plaintiff's place of business in San Diego County.

9. I am authorized to make this declaration for and on behalf of said corporation and I make this declaration for that reason.

I declare under penalty of perjury, that the foregoing is true and correct.

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1 Executed at San Diego, California.

2 Dated: August 22, 1978

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4 *H. Frank Fogleman*  
5 H. FRANK FOGLEMAN  
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